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Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-333

UNITED AIR LINES, INC.,

*Petitioner,*

vs.

CAROLYN J. EVANS,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

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**REPLY BRIEF FOR PETITIONER.**

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In reply to the brief of Evans we shall discuss the arguments raised therein. Five arguments are set forth. United shall deal with them in the order in which they are stated.

I.

**EVANS' ARGUMENT THAT THE TIME LIMIT OF SECTION  
706(d) WAS SATISFIED IN THIS CASE.**

Evans concedes in her brief that timely filing of an EEOC charge is a jurisdictional prerequisite to suit. She also concedes that if she were attacking her 1968 termination, rather than a current employment practice, her claim would be time-barred. As stated by Evans in her brief (p. 14):

"From the very outset of this case, Mrs. Evans has conceded both that the timely filing of an EEOC charge is a

jurisdictional prerequisite to suit, and that, were she simply and solely attacking her 1968 termination, rather than a current employment practice, her claim would be time barred. \* \* \*

Evans maintains, however, that she is not attacking her 1968 termination, but is only attacking United's current and continuing seniority practice with respect to her. As she puts it (Evans' br., p. 10):

"The 'employment practice' here being challenged is United's seniority practice with respect to Mrs. Evans. That practice is clearly current and continuing. It was occurring within 180 days of the day she filed her charge; indeed, it was occurring on the very day she filed her charge. She was injured by it then, is injured by it today, and will be injured by it in the future: . . ."

The specific employment "practice" which Evans claims to be ongoing discrimination against her concerns her placement into the seniority system. She maintains that when she was rehired in 1972, she should have had reinstated to her the seniority date reflecting the period she previously served in United's employ from 1966 to 1968, rather than a seniority date reflecting her status as a new hire in 1972. It is the loss of this prior seniority and the use by United of the new 1972 seniority date for her flight assignments, vacations, etc. which Evans' claims constitutes "continuing" discrimination against her. Since, according to Evans, "continuous discrimination" is present, the statutory time limitation is satisfied by the filing of an EEOC charge at any time during the period such discrimination is in effect. And since this "continuous discrimination" was allegedly in effect in 1973, when Evans first filed her EEOC charge, Evans argues that she satisfied the Section 706 time requirement.

If the underlying assumption in Evans' argument were correct; i.e., if the seniority placement given her in 1972 and its subsequent utilization by United in making flight assignments, etc., constitute separate, discrete, acts of discrimination in themselves within the meaning of Title VII, then Evans' position would be

correct. The error in Evans' position, however, lies in the fact that the seniority she requests is seniority derived solely from her prior employment and her right to reinstatement of that seniority is barred by her failure to file a timely charge in 1968 protesting the loss thereof.

Since Evans concedes that if she were attacking her 1968 termination of employment in its entirety, her attack would be time-barred, she must logically concede that an attack on part of her 1968 termination is also time-barred. At the time of her resignation in 1968, all aspects of Evans' employment terminated, including pay, vacations, travel benefits, etc., as well as seniority. Evans and *Amicus NAACP* admit that she has no rights to back pay lost as a result of her 1968 termination (Evans' br. p. 27; *Amicus NAACP* br. pp. 1-2), but she inconsistently claims she currently has rights to the seniority which she lost as part of that same termination. If her failure to file an EEOC charge within 90 days of her 1968 termination bars her right to reinstatement and back pay—as Evans and the NAACP admit—then surely this same failure bars her right to her pre-1968 seniority.

No "new" act of discrimination occurred in 1972 or thereafter with respect to Evans. The seniority she seeks is inextricably tied to her prior employment. Evans recognized this in her initial Complaint filed in the district court, wherein she stated (Appendix, p. 7):

"Plaintiff complained of and does complain of the fact that United maintained a policy and practice of terminating females, but not males, from their flight personnel (stewardess) positions upon marriage or contemplation of marriage; that plaintiff was forced to resign her position as a stewardess pursuant to this policy; that United refused to reinstate plaintiff; and that, when United did later rehire plaintiff, it refused and continues to refuse to credit plaintiff with all her former seniority."

Evans could not state more clearly that she is asking for the seniority she lost when terminated because of the no-marriage

rule in 1968. But as the *Amicus* NAACP concedes in its brief (p. 2):

"... she [Evans] is forever barred from obtaining the full Title VII relief to which she would otherwise have been entitled solely as a remedy for that unlawful act.\* \* \*"

Apart from her 1966-68 period of employment, Evans had no rights to "extra" or restored seniority when rehired as a new employee in 1972. All rights to that former seniority were barred forever ninety days after her termination in 1968. She may not properly claim such seniority now.

## II.

### **EVANS' ARGUMENT THAT UNITED'S CURRENT SENIORITY PRACTICE IS UNLAWFUL AS APPLIED TO HER BECAUSE IT IS BASED ON, AND PERPETUATES THE EFFECTS OF, PRIOR DISCRIMINATION.**

United's seniority system is neutral in every respect. All employees in the system have the same rights regardless of sex, race, color, religion, or national origin. Seniority begins with employment and ends when employment ends. The system is a fundamental system utilized by numerous employers for the purpose of distributing benefits and assignments based on continuous length of service.

Evans makes it clear in her brief that she is not attacking United's seniority system, but rather is attacking her placement within the system. Thus, in her brief, Evans states (p. 41):

"Mrs. Evans does not seek to dismantle United's seniority system—she merely wishes the inequity produced by United's practice in its application to her to be removed, so that she may assume her rightful place within that system.\* \* \*"

Since Evans is not attacking United's seniority system, it is evident that the "employment practice" which she is attacking arises from United's policy of placing *all* new hires, including

Evans, in the seniority system with new date of hire seniority and of not according rehired former employees "special treatment" by granting them extra seniority reflecting their prior period of employment.

There is, of course, no dispute that United treats all new hires equally, and without regard to race, sex, color, etc. It is this very policy of equal treatment which Evans complains about. She is asking for more seniority than that given all other new hires in her 1972 class. Her concern would be justified if she had a *right* to extra or restored seniority, but, as noted previously, all rights which Evans had to her former seniority were barred in 1968. Accordingly, Evans was properly given new-hire seniority in 1972, the same as all other new hires.

As *Amici* airlines have correctly pointed out in their brief (p. 10), the only current "policy" of United which Evans is challenging here is United's failure to have a policy of reinstating the possible victims of alleged past discrimination (such as Evans) to their former positions. But there is no requirement in Title VII that United have such a policy. Reinstatement of rights is a required remedy for acts of discrimination timely protested with an EEOC charge. It is not a required remedy when the claim to such rights has been barred.

Evans argues, however, that since she is currently suffering the effects of the loss of her 1966-68 seniority, she is a victim of a current and continuing violation of Title VII. Further, that if the principle of continuing wrongs is not applied in her case, then it cannot logically be applied at all. Evans notes that the legislative history accompanying the 1972 amendments to the Act specifically intended to preserve court decisions pertaining to continuing violations (Evans' br., p. 12).

United, of course, does not dispute the fact that there are certain types of violations of Title VII which the courts have held to be "continuing" in nature. Discharge cases, however, are not among them. As this Court recently held in *International U. of Elec. Wkrs. v. Robbins & Myers*, ..... U. S. ...., 97 S. Ct.

441, 446 (1976), a discharge under Title VII is a "final" unlawful employment practice at the time the affected individual "stopped work and ceased receiving pay and benefits." *Johnson v. Railway Express Agency, Inc.*, 421 U. S. 454 (1975) and other cases cited by United in its initial brief in this case represent similar authority.

Evans would have this Court believe that the doctrine enunciated in *Griggs v. Duke Power Company*, 401 U. S. 424 (1971) and in the line of decisions involving departmental seniority systems, such as *Local 189, United Papermakers v. U. S.*, 416 F. 2d 980 (5th Cir. 1969), cert. den. 397 U. S. 919 (1970) is in jeopardy. This is not so. There is no inconsistency between the decision in *Griggs* or in such cases as *United Papermakers* and the enforcement in *Evans* of the time limits established and reaffirmed by Congress. Nor would the barring of Evans' claim disturb the true principle of continuing discrimination that has developed under Title VII.

Let us first consider this Court's decision in *Griggs v. Duke Power Co.*, *supra*. Unlike *Evans*, the testing and educational requirements struck down in *Griggs* were requirements which were themselves discriminatory and which the plaintiffs sought to have abolished. As discussed previously, Evans does not assert that United's seniority system is in itself discriminatory, nor does she seek to dismantle or abolish it in any way—she simply seeks to be "reinstated" in it to her former position. *Griggs* does not represent the proposition that an employment policy or seniority system must affirmatively rectify an otherwise time-barred claim of discrimination or grant special treatment to alleged victims of past discrimination.

In addition, *Griggs* involved clear disparate results between black and white employees in their ability to successfully qualify under the testing and educational requirements. There are no such disparate results between males and females under United's seniority system. Date-of-hire and seniority applies equally to males and females; both may leave the company or be termi-

nated and both would receive new date-of-hire seniority if re-employed. Although Evans refers to the fact that because of her termination in 1968 she finds herself with less seniority than some males, the fact is that she also has less seniority than some females. Sex is not a factor.

Moreover, and more importantly, *Griggs* involved rights of blacks not to be discriminated against in their current endeavors to gain higher rated job positions. No time bars were present. In *Evans*, on the other hand, she is seeking to have restored to her a seniority position to which she has no present right, that right having been barred some five years in the past.

Similarly, Evans' claim does not properly fall within the line of cases involving departmental seniority systems such as *Local 189, United Papermakers v. U. S., supra*. In an analysis of those cases and the question of whether a seniority system, although facially neutral, may be deemed to represent a continuing or present violation under Title VII, two necessary ingredients are involved:

- (a) the discrimination either originated in the seniority system and/or the seniority system itself was so inexorably tied to or tainted by the prior discriminatory practice as to represent a mere extension of it; and
- (b) the aggrieved party has present rights that are being violated by the seniority system.

Evans can claim neither of the above ingredients.

In *Papermakers*, as is typical in departmental seniority cases, the employer historically maintained segregated seniority lists and "lines of progression"—one for whites and one for blacks. Promotion or transfer within each line was determined by "job" or "department" seniority. As a necessary result, blacks were excluded from "white jobs." Ultimately the two lists were merged, but this was effected merely by tacking the black seniority list to the bottom of the white seniority list. The new "merged" seniority list, therefore, was itself as discriminatory as

the two old lists. For purposes of promotion or transfer to formerly all white jobs, the seniority system still did not provide black employees with seniority credit for the years spent in the black jobs and, without such recognition, black employees continued to be excluded from white jobs.

In comparing the decision in *Papermakers* and in the other so-called departmental seniority cases with *Evans*, two differences are clear. First, in the departmental seniority cases, the seniority system itself was discriminatory—both past and present. The discrimination not only originated in the seniority system itself, but the same discrimination was an integral part of the present structure of the seniority system. This is not true in *Evans*. United's seniority system had nothing whatsoever to do with her resignation from employment in 1968 nor her rehire in 1972. If Evans suffered a discrimination, it was because of the former "no-marriage" termination policy, not because of an employment seniority system that was or is in itself discriminatory.

The second distinction is the fact that, as was true in *Griggs*, the black employees in *Papermakers* had a *present right* to have their transfer requests to formerly all white jobs considered on its merits and without racial discrimination. The seniority system itself denied them this right and constituted a current discrimination. This is not true with respect to Evans. Evans had no right of reinstatement to her former employment or seniority in 1972. She possessed only the right to have her 1972 application considered on its merits along with the other applicants. Her reemployment and new date-of-hire seniority did not violate any right which Evans had in 1972 or thereafter. Clearly, even under the departmental seniority cases, an employee whose employment had been terminated in 1968, but who is subsequently rehired four years later has no claim other than to have her new application for employment fairly considered against other new employees, black or white, who compete for hire with her.

Separate mention must be made of *Acha v. Beame*, 531 F. 2d 648 (2d Cir. 1976), a decision heavily relied upon by Evans in her brief. In *Acha*, two plaintiffs brought an action under Title VII and under 42 U. S. C. § 1983 on behalf of themselves and other female police officers to stay their threatened layoff from the New York City police force under the "last-hired, first fired" method. The gist of their complaint was that since the threatened layoffs were based on seniority, they were necessarily sex-discriminatory in that the Police Department had not hired women as police officers until 1973 and then hiring was made from separate lists in a ratio of four men to one woman. Since so many females had been hired only recently, the "last-hired, first-fired" system affected them more than males. The district court, *sua sponte*, before any answer, motion or time limit defense had been presented by the defendant, denied plaintiffs' motion for a preliminary injunction and dismissed the complaint. *Acha v. Beame*, 401 F. Supp. 816 (S. D. N. Y. 1975). This dismissal was based upon the finding that the "last hired, first fired" method of layoff was part of a bona fide seniority system and that to grant relief to plaintiffs would constitute preferential treatment on the basis of sex, violating Section 703(j) of Title VII.

Noteworthy is the fact that the time limitation issue concerning the plaintiffs' failure to file a charge within the statutory limits of Section 706(e) (with regard to the previous refusals to hire because of sex) was never reached in *Acha*—either in the district court prior to appeal or on appeal. On appeal, the Second Circuit focused upon Section 703(h) and, in reversing the district court, held that an adjustment of seniority as a remedy is not precluded by Section 703(h).

Ironically, on remand, when the time limitation question under Title VII was *first raised* in *Acha*, the district court denied such defense, but based its denial upon the Seventh Circuit's ruling in *Evans* as its sole precedent. .... F. Supp. ...., 13 FEP Cases 16, 18.

Evans has from the outset asserted and relied upon *Acha* as authority supporting the timeliness of her claim. In fact, however, the timeliness issue was only recently ruled upon in *Acha* and then decided on the basis of *Evans*. Thus, we have come full circle: Evans cites *Acha* and *Acha* cites *Evans*. The *Acha* case does not merit consideration as contrary precedent here.

*Amicus NAACP* notes that Congress, when amending Title VII in 1972, placed a two year limitation on back pay, and thus recognized that there are "continuing violations" of Title VII which may be subject to challenge before the EEOC and in the courts (*Amicus NAACP* br. pp. 3-5). The short answer to this observation is that there is no dispute "continuing" discriminatory employment practices are involved in certain types of cases. *Evans*, however, is not such a case. In *Evans*, the basis of her complaint involves the application of the no-marriage rule to her in 1968. That rule was terminated in November, 1968 and no continuing violation is involved. United does not take the position in this case that "continuing violations" do not exist in appropriate cases; it takes the position that *Evans* does not involve such a violation.

### III.

#### EVANS' ARGUMENT THAT THE CASES CITED IN SUPPORT OF UNITED'S POSITION ARE INAPPOSITE.

Evans endeavors to distinguish the cases cited by United in support of its position on the basis that they either involve unrelated facts situations or "only discharges and nothing more", unlike Evans wherein a current and continuing on-the-job seniority practice has been challenged.

Without discussing again all points raised in United's initial brief, United wishes to note that the arguments raised by Evans involve distinctions without differences.

The reason United cited the cases is twofold. First, they demonstrate that timely filing of an EEOC charge is a jurisdic-

tional prerequisite to suit. Evans concedes in her brief that this is correct (Evans' br., p. 14). Second, they show that the courts have considered such actions as discriminatory discharges, transfers and the like as completed acts, not as "continuing" violations, even though there are always some "lingering effects" of these actions. *Evans* involves a completed act.

The argument that "lingering effects" constitute new and actionable violations of Title VII in themselves was effectively rejected by this Court in an analogous case arising under the National Labor Relations Act, 29 U. S. C. § 141 *et seq.*

In *Local Lodge No. 1424, International Ass'n. of Machinists v. NLRB*, 362 U. S. 411 (1960), a union that did not represent a majority of a unit of employees negotiated a collective agreement covering that unit. The agreement had a clause recognizing the union as the exclusive bargaining agent and a clause requiring all unit employees to join and remain members of the union. It is an unfair labor practice to enter into such an agreement under these circumstances. No charge, however, was filed with the National Labor Relations Board within the six-month period after the commission of that wrong as required by § 10(b) of the National Labor Relations Act. Instead, 10 months after the execution of the agreement, a charge against the union was filed and was upheld by the NLRB as timely filed based upon the theory that a current or continuing violation was involved "... since it was 'based upon' the parties' continued enforcement, within the period of limitations, of the union security clause." (*Id.* at 415; emphasis in original). It was argued that even though the violation relating to execution of the agreement was time-barred, the unlawful execution of the agreement was nevertheless relevant in determining whether conduct within the 6-month period was unlawful and that evidence as to it was admissible because § 10(b) is a statute of limitations, not a rule of evidence.

The Court rejected this argument. Mr. Justice Harlan's analysis merits extensive quotation (362 U. S. at 416-417, 419; footnotes omitted):

"It is doubtless true that § 10(b) does not prevent all use of evidence relating to events transpiring more than six months before the filing and service of an unfair labor practice charge. However, in applying rules of evidence as to the admissibility of past events, due regard for the purposes of § 10(b) requires that two different kinds of situations be distinguished. The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose § 10(b) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely 'evidentiary,' since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice.

"The situation before us is of this latter variety, for the entire foundation of the unfair labor practice charged was the Union's time-barred lack of majority status when the original collective bargaining agreement was signed. In the absence of that fact enforcement of this otherwise valid union security clause was wholly benign.\*\*\*

\* \* \* \* \*

"Where, as here, a collective bargaining agreement and its enforcement are both perfectly lawful on the face of things, and an unfair labor practice cannot be made out except by reliance on the fact of the agreement's original unlawful execution, an event which, because of limitations, cannot itself be made the subject of an unfair labor practice complaint, we think that permitting resort to the principle that § 10(b) is not a rule of evidence, in order to convert what is otherwise legal into something illegal, would vitiate the policies underlying that section. These policies are to bar litigation over past events 'after records have been de-

stroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused,'" H. R. Rep. No. 245, 80th Cong., 1st Sess., p. 40, and of course to stabilize existing bargaining relationships."

The distinction drawn in the *Machinists* case is applicable here. Evans' present claim is an attempt to revive a "legally defunct" act that occurred in 1968 and is properly barred by Section 706(d) of Title VII. In truth, she has no claim and does not assert that United's seniority system is, standing alone, unlawful. Instead, the only means by which Evans claims the neutral seniority system is discriminatory is with reference to an alleged act of discrimination in 1968. Rather than a seniority system that itself is discriminatory with respect to sex, it is her discharge and loss of seniority in 1968 which is the true basis and "underlying legal wrong" of her claim. The time limits in Section 706 have the same purpose in Title VII that § 10(b) has in the NLRA. The reasoning of this Court in the *Machinists* case applies to *Evans* with equal force.

As stated in our initial brief, if the broad extension of the "continuing discrimination" concept asserted in *Evans* were to receive acceptance, then *any* present employee who claims he or she was discriminated against in the past could wait indefinitely and file a charge any time in the future, as did Evans, so long as some "collateral effects" of the past act of discrimination are present. It is understandable why Evans did not respond to the examples given in our initial brief (United's br. p. 19)—they are not distinguishable and clearly illustrate that in such cases and others, any period of limitations for Title VII actions would be rendered meaningless if the *Evans*' rationale were accepted. Evans recognizes this is true because she argues that defendants have the principle of laches which they may raise if appropriate (*Evans*' br. pp. 24-25). The principle of laches, however, was clearly not the Congressional intent since it established time limits in Section 706(d) when the Act was originally passed in 1964 and it affirmed time limits in the 1972 amendments.

## IV.

**EVANS' ARGUMENT THAT EVANS AND COLLINS  
ARE COMPATIBLE.**

Evans suggests that the Ninth Circuit's decision in *Collins v. United*, 514 F. 2d 594 (9th Cir. 1975) is compatible with the decision in *Evans*. She ignores the fact that the majority of the Seventh Circuit did not agree with her in their initial decision in *Evans*, 12 FEP cases 288, 290 (7th Cir. 1976) (Appendix, at 25-26):

"Evans would have this Court find a present discrimination when the adverse effect of a past discrimination is still felt because of a current policy of the employer, even though such current policy is not discriminatory with respect to sex. This is congruent with the thesis that the Ninth Circuit specifically declined to accept in *Collins* when it stated that 'the alleged unlawful act or practice—not merely, its effects—. . . must have occurred within [the statutory period] preceding the filing of charges before the EEOC.'"

The Seventh Circuit reversed its initial decision *only* because of its interpretation of this Court's ruling in *Franks v. Bowman Transportation Co.*, 424 U. S. 747 (1976), *not* because it felt that the decision in *Collins* was compatible with its revised ruling. In fact, reference to and discussion of the decision in *Collins* is conspicuously absent from the Seventh Circuit's second decision in *Evans*, 534 F. 2d 1247 (1976). (Appendix, at 33-40).

Evans suggests that United, in likening *Collins* to *Evans*, "has confused the mere passive effects of past discrimination with a so-called present act in *Evans* (Evans' br. p. 35). In truth, the only difference between the *Collins* and *Evans* cases is the fact that Evans was reemployed in 1972 whereas Collins was not. Clearly, the act of reemployment was not discriminatory, nor was the routine act of conferring new date-of-hire seniority upon her, as upon any other rehire. Like Collins,

Evans had no right to reinstatement. Evans, however, once rehired, claims that she is necessarily entitled to the seniority benefits of reinstatement, even though she concedes she is barred from obtaining other benefits related to her prior employment. There is no escaping the anomaly, under Evans' theory, that any employee who is rehired may avoid the limitation period as to the prior discharge, while the employee who is not rehired is bound by it.

Evans in her brief cites two recent decisions within the Ninth Circuit as authority for the proposition that *Evans* and *Collins* are compatible (Evans' br. p. 36). In the first case, *Gibson v. Local 40, Supercargoers & Checkers, etc.*, 543 F. 2d 1259 (9th Cir., 1976), the "underlying legal wrong" was the exclusion of blacks from employment or referral as "casual clerks." This racial discrimination was "perpetuated" both in the lack of hiring or nonplacement of blacks on the "casual clerk" seniority list and in the removal and ultimate exclusion of blacks from this list. The *Gibson* case is distinguishable not only by the fact that blacks were excluded from the seniority list itself but, unlike *Evans* and *Collins*, a charge of discrimination was filed by Gibson within the statutory period after his application for employment or referral as a "casual clerk" was not accepted.<sup>1</sup> There simply was no time limitation issue in *Gibson* as there is in *Evans* and was in *Collins*.

The *Kennan v. Pan American World Airways, Inc.*, 13 FEP Cases 1530 (N. D. Cal. 1976), decision also cited by

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1. Since there was no time limitation issue in *Gibson*, the Ninth Circuit's opinion does not indicate specifically when Booker Gibson first filed his charge with the EEOC. It is clear, however, that Mr. Gibson applied for employment as a casual clerk in October, 1967, and filed his charge the same month since the opinion states:

"Five blacks were added to the group referred for casual employment in October and November of 1967 . . . It is uncontradicted that the first black, appellant Gibson, was accepted for referral as a casual clerk only after he filed a complaint with the EEOC. The four other blacks were added to the group referred for casual employment shortly thereafter." (*Id.* at 1266.)

Evans is no authority for *Evans* since it simply follows *Evans*, but notes the conflict between *Collins* and *Evans*.

## V.

**EVANS' ARGUMENT THAT THE COURT OF APPEALS' DECISION IS ENTIRELY CONSISTENT WITH THIS COURT'S REASONING IN *FRANKS v. BOWMAN*.**

The final suggestion of Evans and the one followed by the Seventh Circuit in reversing its decision after this Court decided *Franks v. Bowman Transportation Co., supra*, is that United must show ". . . that Section 703(h) immunized its seniority policy from attack, alteration or interference under Title VII" (Evans' br. p. 39). In *Franks*, this Court held that Section 703(h) insulates "an otherwise *bona fide* seniority system from a challenge that it amounts to a discriminatory practice because it perpetuates the effects of pre-Act discrimination" (424 U. S. at 781). Since Section 703(h) immunizes *bona fide* seniority systems only for pre-Act discrimination, Evans then appears to argue that this necessarily means that if a post-Title VII act of discrimination is alleged and if a *bona fide* seniority system does not rectify the effects of that past act of discrimination, then the seniority practice is unlawful and a continuing violation is present. As a result, any time limits applicable to that past act of discrimination are no longer relevant.

This, of course, was not the holding in *Franks* and this reasoning would convert *Franks* from a recognition of the Congressional objectives in Sections 703(h) and 706(g) not to prohibit "make whole" relief, including "rightful placement" in a *bona fide* seniority system, *when timely claims of post-Act discrimination are presented* into a complete abolishment of time limits for claims of post-Act discrimination (regardless of when the post-Act discrimination occurred) if that act ad-

versely affected seniority and an adjustment of seniority is sought as a remedy.<sup>2</sup>

In *Franks*, post-Act discrimination was involved and a seniority remedy was sought. But rather than holding that a *bona fide* seniority practice becomes unlawful because it does not grant retroactive seniority, as Evans would suggest, this Court properly looked to the "underlying legal wrong" and observed that:

"The underlying legal wrong affecting them [plaintiffs] is not the alleged operation of a racially discriminatory seniority system but of a racially discriminatory hiring system. Petitioners do not ask modification or elimination of the existing seniority system, but only an award of the seniority status they would have individually enjoyed under the present system but for the illegal discriminatory refusal to hire." (*id.* at 758.)

Here, the "underlying legal wrong" about which Evans complains is not United's seniority system. Evans does not ask to modify or eliminate the existing seniority system as unlawful or based upon sex discrimination. Instead, she seeks a seniority remedy for her alleged discriminatory termination in 1968. In *Franks*, there was no contention before this Court that timely charges in connection with the "underlying legal wrong" had not been filed within the statutory period. In the absence of a time limitation question, this Court held that section 703(h) did not bar the grant of retroactive seniority to provide appropriate "make whole" relief for that "underlying legal wrong." Evans' "underlying legal wrong," on the other hand, occurred five years before she filed any charge of alleged discrimination and her claim, necessarily based on that act of discrimination, is time-barred. The decision in *Franks* does not authorize "unbarring" of her claim.

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2. As stated in the brief *amici curiae* of the Equal Employment Advisory Council, Airline Industrial Relations Conference, and Air Transport Association (p. 15):

"By reviving Evans' long-barred claim of prior illegal termination by means of calling the routine operation of a *bona fide* system an unlawful 'perpetuation' of that previous discrimination, *Evans II* has converted the availability of a *remedy* into the substance of a *wrong*."

**CONCLUSION.**

For the foregoing reasons, it is respectfully urged that this Court should reverse the decision of the Seventh Circuit Court of Appeals and affirm the judgment of the District Court previously entered.

Respectfully submitted,

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